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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA  
2009 FEB -6 PM 3: 24  
JEANNE HICKS, CLERK  
BY: Beth Blanton ✓

ARIZONA SUPERIOR COURT  
YAVAPAI COUNTY

11 STATE OF ARIZONA,

12 Plaintiff,

13 vs.

14 STEVEN CARROLL DEMOCKER,

15 Defendant.

No. CR 2008-1339

Division 6

**RESPONSE OF AMERICAN  
BROADCASTING COMPANIES,  
INC. ("ABC") TO  
DEFENDANT'S POSITION  
STATEMENT AND STATE'S  
AMENDED MOTION FOR  
HEARING AND RULING RE  
PUBLIC RECORDS REQUEST**

(Assigned to the Hon. Thomas B.  
Lindberg)

[Hearing Set for 2 p.m., Feb. 10,  
2009]

Preliminary Statement

21 The State's motions for a ruling on ABC's public records requests stem  
22 from two fundamental misreadings of Arizona law: (1) the State's abdication of its legal  
23 duty to produce these records promptly without judicial direction, and (2) Defendant's  
24 rhetorical objections to the State's intended disclosures, devoid of any actions to block  
25 the release of these public records. As a matter of well-settled Arizona law, records of  
26 ongoing criminal investigations – including police reports and witness interviews – are  
27 public records, and they are subject to a "strong" presumption in favor of disclosure  
28

under the Arizona Public Records Law. *Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993). Unless the State had satisfied itself of a probability of “specific, material” harm resulting from disclosure, it should have produced copies of the records to ABC “promptly.” *E.g., Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984); A.R.S. § 39-121.01(D)(1) (public bodies “shall promptly furnish” public records upon request).

Instead of meeting its duties under the Public Records Law, the State sought judicial review and authorization of its intended disclosures. To avoid legal expenses and promote judicial economy, ABC reached an agreement with the State concerning these disclosures. It agreed to withdraw its request for autopsy photographs, crime scene photographs depicting the decedent victim and even witness statements, so long as (a) the remaining records would be released promptly, and (b) it could request these records or challenge any redactions at a later date. But Defendant then filed a position statement evidently intended to preserve his objections to the disclosure of these records and would not stipulate to their release. Significantly, Defendant did not seek injunctive or other relief from the Court to prevent the State from disclosing these public records. *E.g., Griffis v. Pinal County*, 215 Ariz. 1, 3, 156 P.3d 418, 420 (2007). Consequently, the State filed an amended motion for judicial review of its disclosure duties and left ABC no choice but to brief these legal issues. To avoid further delay, the Court should direct the State to produce all of these public records, including witness statements, unless it can show the probability of specific, material harm stemming from disclosure. *Cox*, 175 Ariz. at 14, 852 P.2d at 1198; *Mitchell*, 142 Ariz. 332, 690 P.2d 51.

### Pertinent Background

On January 5, 2009, ABC producer Andrew Paparella submitted a request pursuant to A.R.S. § 39-121, *et seq.* (the “Arizona Public Records Law”) to the State to inspect all investigative records, including police reports, crime scene photographs, witness interviews, autopsy reports, search warrant affidavits, 911 calls and related records. The following day, the State filed a Motion for Hearing and Ruling on Public

1 Records Request and Request for *In Camera* Review of the Documents. At the January 9,  
2 2009 hearing regarding ABC's Motion for Camera Coverage, the State indicated that it  
3 was prepared to disclose all of the requested records, with appropriate redactions, except  
4 for (1) autopsy photographs, (2) physical evidence, and (3) witness interviews and  
5 statements. ABC revised its request on January 23, 2009, clarifying that it seeks to inspect  
6 all records described in its January 5 request except for "crime scene photos showing the  
7 victim, or autopsy photos, or skull x-rays" (collectively, the "Records"). ABC never  
8 sought to inspect physical evidence.

9 A few days later, ABC and the State agreed that the State would (1)  
10 withdraw its hearing request, and (2) promptly produce to ABC, after providing Defendant  
11 five days' notice of the impending disclosures, all of the requested records except autopsy  
12 photographs, physical evidence and witness interviews and statements (subject to ABC's  
13 right to challenge the State's redactions and renew its request to inspect the withheld  
14 records at a later juncture). When Defendant filed its position statement on January 30,  
15 the agreement unraveled. The State now seeks *in camera* review of the Records, and  
16 ABC has renewed its request to inspect all of the Records except for crime scene photos  
17 showing the victim, autopsy photos or skull x-rays.

#### 18 Argument

#### 19 I. THE RECORDS ARE PUBLIC RECORDS, AND THE PUBLIC RECORDS 20 LAW REQUIRES THE STATE TO PROMPTLY PRODUCE THEM FOR INSPECTION UPON REQUEST.

21 As a threshold matter, the Records fall squarely within the disclosure  
22 requirements of the Arizona Public Records Law. A.R.S. § 39-121.01(B) requires public  
23 bodies to maintain "all records . . . reasonably necessary or appropriate to maintain an  
24 accurate knowledge of their official activities and of any of their activities which are  
25 supported by monies from the state or any political subdivision of the state." *See Carlson*  
26 *v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). Here, the Records are  
27 undeniably public records because they reflect the State's official investigation of this  
28

1 case. *Griffis*, 215 Ariz. at 4, 156 P.3d at 421 (holding records with substantial nexus to a  
2 public body's official activities are public records).

3 Because the Records are public records, the State has a duty in the first  
4 instance to review them, redact any information exempt from disclosure and produce the  
5 remainder promptly. See A.R.S. § 39-121.01(E) ("Access to a public record is deemed  
6 denied if a custodian fails to *promptly* respond to a request. . . .") (emphasis added). Here,  
7 the State has not exercised its discretion as required by the law. *Carlson*, 141 Ariz. at 491,  
8 687 P.2d at 1246 (noting right of inspection is "subject to the official's discretion to deny  
9 or restrict access" and that "[s]uch discretionary refusal is subject to judicial scrutiny.").  
10 Accordingly, the Court should order the State, as the records custodian, to make available  
11 for inspection all records except those where countervailing interests are "appropriately  
12 invoked" to prevent inspection. *Id.*

13 II. RECORDS OF ONGOING CRIMINAL INVESTIGATIONS, INCLUDING  
14 AUDIO TAPES OF WITNESS INTERVIEWS, ARE PRESUMPTIVELY  
SUBJECT TO PUBLIC INSPECTION UNDER THE PUBLIC RECORDS LAW.

15 The Arizona Public Records Law commands that "[p]ublic records . . . *shall*  
16 *be open to inspection* by any person at all times during office hours." A.R.S. § 39-121  
17 (emphasis added). The statute "provide[s] a broad right of inspection to the public" and  
18 "evinces a clear policy favoring disclosure." *Carlson*, 141 Ariz. at 490, 687 P.2d at  
19 1245. Indeed, "access and disclosure is the strong policy of the law . . . ." *Id.*, 141 Ariz.  
20 at 491, 687 P.2d at 1246. In view of this strong public policy in favor of disclosure, the  
21 Arizona Supreme Court has recognized that "all records required to be kept under A.R.S.  
22 § 39-121.01(B) are *presumed* open to the public for inspection as public records." *Id.*  
23 (emphasis added). In applying the statute, all "[d]oubts should be resolved in favor of  
24 disclosure." Op. Ariz. Att'y Gen. No. R75-781 (1975-1976), at 145.

25 The presumption of openness may be overcome only if the party seeking  
26 closure demonstrates with *specific facts* that "countervailing interests of confidentiality,  
27 privacy or the best interests of the state" warrant nondisclosure. *Carlson*, 141 Ariz. at  
28 491, 687 P.2d at 1246. Neither "global generalities" nor "blanket rule[s]" may be used to

1 justify nondisclosure. *Cox*, 175 Ariz. at 14, 852 P.2d at 1198. Rather, the party opposing  
2 access must “specifically demonstrate” how production of the requested records would  
3 cause harm. *Id.*; *Mitchell*, 142 Ariz. at 335, 690 P.2d at 54 (official seeking closure has  
4 the heavy burden of proving “the probability that *specific, material harm* will result from  
5 disclosure, thus *justifying an exception to the usual rule of full disclosure. . . .*”) (emphasis added); *Star Publ’g Co. v. Pima County Attorney’s Office*, 181 Ariz. 432, 434,  
6 891 P.2d 899, 901 (Ct. App. 1993) (“public records are presumed open to the public for  
7 inspection unless the public official can demonstrate *a factual basis* why a particular  
8 record ought not be disclosed”) (emphasis added).

10           The Arizona Supreme Court has held explicitly that records of ongoing  
11 criminal investigations are subject to the broad presumption of access embodied in the  
12 Public Records Law. *Cox*, 175 Ariz. at 14, 852 P.2d at 1198. Importantly, the Arizona  
13 Legislature has *not* exempted police reports, witness interviews, 911 tapes, autopsy reports  
14 and related records from the Public Records Law. *Id.*, 175 Ariz. at 15, 852 P.2d at 1199  
15 (Corcoran, J., concurring) (“Until the legislature acts, this court should . . . apply the broad  
16 terms of the Public Records Law to ongoing criminal investigations.”); *Phoenix*  
17 *Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273, 159 P.3d 578, 583 (Ct. App. 2007) (ordering  
18 disclosure of document describing alleged rape of high school student by janitor; “The  
19 legislature has specifically provided that certain documents are not public records because  
20 of confidentiality concerns, but notices of claim are not among them. Without an express  
21 statutory exemption[,], a bare assertion of confidentiality does not make a document any  
22 less a public record.”).

23           The sort of vague and generalized assertions of harm made by the parties  
24 here cannot prevent access to public records of an ongoing criminal investigation. In *Cox*  
25 *Arizona Publications, Inc. v. Collins*, 169 Ariz. 189, 818 P.2d 174 (Ct. App. 1991),  
26 *reversed*, 175 Ariz. 11, 852 P.2d 1194 (1993), the Court of Appeals held that blanket  
27 assertions of harm could prevent public access to records of an ongoing criminal  
28

1 investigation into alleged drug use by then-current or former members of the Phoenix  
2 Suns:

3           Neither reporters nor the public . . . are entitled to examine and  
4 photocopy police reports in an active ongoing criminal  
5 prosecution, because the countervailing interests of *due process, confidentiality, privacy* and the best interests of the state make disclosure inappropriate.

6 169 Ariz. at 201, 818 P.2d at 186 (emphasis added). However, the Arizona Supreme  
7 Court expressly rejected this view. The Supreme Court held:

8           We cannot support such a sweeping exemption from the public  
9 records laws of this state. Although the balancing scheme  
10 described in *Mathews*, 75 Ariz. at 80-81, 251 P.2d at 896,  
11 might, in **a particular and exceptional case**, lead to a  
12 conclusion similar to that reached by the court of appeals, the  
blanket rule advanced by that court contravenes the strong  
policy favoring open disclosure and access, as articulated in  
Arizona statutes and case law. The legislature has not carved  
out such a broad exemption, nor do we.

13 175 Ariz. at 14, 852 P.2d at 1198 (emphasis added).

14           To date, the State and Defendant have not shown that this is the “particular  
15 and exceptional” case to which the Arizona Supreme Court referred in *Cox*. Instead, both  
16 parties have offered only “global generalities” and “blanket rule[s]” to oppose inspection.  
17 *Id.* For example, it is difficult to imagine that the parties can specifically demonstrate that  
18 disclosure of the witness interview tapes would harm an interest that is capable of  
19 outweighing the strong public interest in these Records. *See Phoenix Newspapers, Inc. v.*  
20 *Keegan*, 201 Ariz. 344, 351, 35 P.3d 105, 112 (Ct. App. 2001) (“The public’s right to  
21 know any public document is weighty in itself.”). Indeed, the public interest in the  
22 Records is acute given the nature of this case, in which a public figure is accused of  
23 murdering his ex-wife, another local public figure. As a matter of well-settled law, the  
24 public has a strong interest in these Records to monitor the State’s investigation and  
25 prosecution of Defendant. *See, e.g., Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz.  
26 335, 343, 783 P.2d 781, 789 (1989) (“It is difficult to conceive of an area of greater public  
27 interest than law enforcement.”); *Keegan*, 201 Ariz. at 351, 35 P.3d at 112 (“The core  
28 purpose of the public records law is to allow public access to official records and other

1 government information so that the public may monitor the performance of  
2 government.”). Simply put, the parties have *not* demonstrated that *any* harm will result  
3 from disclosure of the Records.

4 To the extent that Defendant suggests that disclosure of the interview tapes  
5 and other Records *might* prejudice his defense or taint the jury pool, such concerns are  
6 speculative and entirely premature. First, this case is presumably months away from trial  
7 – if any such trial occurs. Second, Yavapai County is a large, growing county with a  
8 population in 2007 of 233,934, which is certainly large enough to find an unbiased jury  
9 pool. Third, less-restrictive alternatives exist than withholding the witness tapes and other  
10 Records. As the United States Supreme Court noted in an analogous case involving  
11 public access to criminal proceedings, *voir dire* is more than sufficient to prevent any  
12 conceivable prejudice:

13 [T]his risk of prejudice [to the jury selection process] does not  
14 automatically justify refusing public access. . . Through *voir*  
15 *dire*, cumbersome as it is in some circumstances, a court can  
identify those jurors whose prior knowledge of a case would  
disable them from rendering an impartial verdict.

16 *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986). At bottom, the risk of  
17 prejudice to Defendant at this early stage of the proceedings is slight, and the Court should  
18 order disclosure of the tapes. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1032 (1984)  
19 (jurors not prejudiced by adverse publicity that significantly predated trial).

20 Similarly, the State’s broad claim that disclosure of the witness interview  
21 tapes or transcripts poses a “serious threat of prejudice” to the prosecution is similarly  
22 incapable of overcoming the Public Records Law’s presumption of access to public  
23 records. Indeed, this is the same argument rejected by the Arizona Supreme Court in *Cox*.  
24 The State must present a factual basis showing how disclosure of *particular* witness tapes  
25 or portions of tapes would cause a “specific, material harm” to its prosecution of  
26 Defendant. *Mitchell*, 142 Ariz. at 335, 690 P.2d at 54. To date, prosecutors have made no  
27 such showing. At the January 9 hearing, the State speculated that disclosure of witness  
28 tapes might contaminate other witness statements. Yet Defendant was arrested more than

1 three months ago in connection with a crime committed in May 2008, giving the State  
2 ample time to interview witnesses, prepare statements and conduct additional  
3 investigation. All of these materials can be used at trial to verify statements or impeach  
4 testimony. As such, there is little risk of serious prejudice to the prosecution.

5 In the alternative, if the Court finds that disclosure of any information  
6 contained in the tapes or other Records would cause a specific, material harm to the  
7 prosecution, or would harm the interests of privacy or confidentiality, then *limited*  
8 redaction of the Records (or transcripts of the tapes) – not wholesale withholding – is the  
9 proper means of protecting these interests. *See Carlson*, 141 Ariz. at 490-91, 687 P.2d at  
10 1245-46 (approving of *in camera* inspection and redaction as an alternative to non-  
11 disclosure); *Cox*, 175 Ariz. at 15, 852 P.2d at 1199 (same).

12 III. PRIVACY CONCERNS ARE INSUFFICIENT TO PREVENT DISCLOSURE OF  
13 THE RECORDS SOUGHT BY ABC.

14 Defendant's position statement asserts that the privacy rights of Defendant  
15 and his daughters outweigh the public interest in disclosure of the Records. ABC's  
16 decision not to seek crime scene photos showing the victim, autopsy photos and x-rays  
17 adequately addresses these concerns. To the extent there is other information in the  
18 Records that could implicate the privacy interests of Defendant's daughters, including  
19 personally-identifying information, such information can be redacted from the Records.  
20 For the reasons set forth below, the remaining privacy interests advanced by Defendant  
21 are insufficient to prevent disclosure of the Records.

22 First, Defendant has no reasonable expectation of privacy in any witness  
23 statement or other information he gave to police. *E.g., Godbehere*, 162 Ariz. at 343, 783  
24 P.2d at 789 ("[P]rivacy rights are absent or limited in connection with the life of a person  
25 in whom the public has a rightful interest, or where the information would be of public  
26 benefit.") (internal quotations omitted). Because Defendant was accused of a capital  
27 crime – and apparently participated in a taped interview with police – his privacy interests  
28 are particularly remote:



1 There are other individuals who have not sought publicity or  
2 consented to it, but through their own conduct . . . have  
3 become a legitimate subject of public interest. They have, in  
4 other words, become “news.” Those who commit crime or are  
5 accused of it may not only not seek publicity but may make  
6 every possible effort to avoid it, but they are nevertheless  
7 persons of public interest, concerning whom the public is  
8 entitled to be informed.

9 Restatement (Second) of Torts § 652D, cmt. f. To the extent that any of the Records have  
10 been (or will be) used in these proceedings, Defendant has no expectation that they will  
11 remain private. *E.g.*, Ariz. Const. art II, § 11 (“Justice in all cases shall be administered  
12 openly . . . .”); *cf. Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event.  
13 What transpires in the court room is public property.”).

14 Second, the privacy interests asserted by Defendant are not sufficient to  
15 withhold the 911 tape of the telephone call made by the victim’s mother. *E.g.*, *A.H. Belo*  
16 *Corp. v. Mesa Police Department*, 202 Ariz. 184, 42 P.3d 615 (Ct. App. 2002). The  
17 privacy interest in *Belo* – the surviving family’s desire not to be re-traumatized by hearing  
18 “the cries and whimpers” of a dying child captured on the 911 tape – is not present here.  
19 *Id.*, 202 Ariz. at 187, 42 P.3d at 618. Rather, the call was placed from Nashville,  
20 Tennessee by Ms. Kennedy, who apparently was on the telephone with her daughter  
21 before the attack. For this reason, *Belo* is largely inapposite.

22 \* \* \*

23 ABC has waited for more than a month to inspect basic public records that  
24 will inform the public about a murder investigation and its attendant prosecution in a case  
25 of great public interest. If the Court orders disclosure of the Records, it should consider  
26 awarding ABC its reasonable attorneys’ fees incurred to prepare this brief and appear at  
27 the February 10, 2009 hearing. A.R.S. § 39-121.02(B) (“The court may award attorney  
28 fees and other legal costs that are reasonably incurred in any action under this article if the  
person seeking public records has substantially prevailed.”). *E.g.*, *Arpaio v. Citizen*  
*Publ’g Co.*, No. 2 CA-CV 2008-0062, 2008 WL 5340884 (Ariz. Ct. App. Dec. 18, 2008)  
(affirming attorneys’ fees award to newspaper as prevailing party in declaratory judgment

1 action brought by Pima County Attorney under Public Records Law against Maricopa  
2 County Sheriff, who prevented records custodian from making records available for  
3 inspection).

4  
5 Conclusion

6 For the foregoing reasons, the Court should order disclosure of the Records as  
7 promptly as possible.

8 RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of February, 2009.

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18 Jeanne Hicks  
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22 with a copy of the foregoing faxed  
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24 The Hon. Thomas B. Lindberg  
25 Judge of the Superior Court  
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